Supreme Court, U.S.
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In The

Supreme Court of the United States

THE STATE OF OKLAHOMA, ex rel., Moshe Tal, and Taxpayers Against Ripoffs ("T.A.R."), an association of more than ten resident taxpayers of the City of Oklahoma City, Oklahoma,

Petitioners,

v.

THE CITY OF OKLAHOMA CITY, OKLAHOMA, et al.,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Oklahoma

RESPONDENT TORCHMARK CORPORATION'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

JOHN T. EDWARDS
*ROBERT C. SMITH, JR.
MONNET HAYES BULLIS THOMPSON & EDWARDS
120 North Robinson, Suite 1719
Oklahoma City, Oklahoma 73102
(405) 232-5481

Attorneys for Respondent Torchmark Corporation

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED FOR REVIEW

Can the State deny a taxpayer the right to relitigate a previously decided *qui tam* action which, by state law, can only be brought by the taxpayer if the appropriate government official, after a proper taxpayer's demand, refuses to institute or diligently prosecute the matter, on the basis that in the previous action pertaining to the taxpayer's demand, the court has already determined by a denial of the taxpayer's motion to intervene in that action the appropriate government official was adequately representing taxpayers' common interest and, thus, the taxpayer had no standing to pursue the *qui tam* action?

CORPORATE DISCLOSURE STATEMENT

Respondent Torchmark Corporation, an Alabama corporation, is the parent corporation of several other entities, and there is no other publicly held company owning 10% or more of Torchmark's stock.

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STATEMENT OF THE CASE

This action concerns complaints made by taxpayers led by Moshe Tal[1] concerning public funds being used for redevelopment of the Bricktown area under the Oklahoma City Metropolitan Area Projects program, known as "MAPS". As a result of Moshe Tal's allegations, three separate lawsuits have been filed in Oklahoma state courts.[2]

Under Oklahoma's *qui tam* statute,[3] Moshe Tal, on September 9, 1998, filed a written demand requesting Oklahoma City to institute the appropriate legal action to have the contract concerning the Bricktown Ball Park declared invalid and to recover all funds paid under the contract. Before the appropriate government official could respond to the written demand, Moshe Tal filed a *qui tam* action seeking to have the Bricktown Ball Park transaction declared void and to recover the funds paid under the contract. Thereafter, on October 16, 1998, Oklahoma City filed a declaratory judgment action in state court seeking to determine the validity of the Bricktown

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[1] Moshe Tal had previously participated in submitting proposals to develop certain Bricktown property, but those proposals were not accepted and competing bidders, including some of the respondents, were awarded the contracts. *See* Opinion in *Tal II*, App. to Petition, p. 35. Petitioners will be hereinafter referred to as "Moshe Tal".

[2] Those three (3) lawsuits have resulted in three (3) separate appeals to the Oklahoma Supreme Court and those appeals have been commonly referred to as *Tal I*, *Tal II*, and *Tal III*. *See* App. to Petition, pp. 1-43.

[3] Okla. Stat. tit. 62, §§372-373. *See* App. to Petition, pp. 44-45.

Ball Park transaction. Opinion, App. to Petition, pp. 32-38.

The trial court, on May 26, 1999, dismissed the *qui tam* action brought by Moshe Tal on the basis that it was premature under Oklahoma's *qui tam* statute because the appropriate government authority was pursuing the action. Moshe Tal appealed that dismissal to the Oklahoma Supreme Court (referred to as *Tal II*). Opinion, App. to Petition, pp. 32-38.

While *Tal II* was pending in the trial court, Moshe Tal filed another demand with Oklahoma City on September 12, 1999, contesting other redevelopment contracts concerning Bricktown redevelopment entered into under the MAPS program. In response to this demand, the City on January 16, 1999, filed a declaratory judgment action requesting the court to determine the validity of those contracts questioned by Moshe Tal in the written demand. Prior to a trial of the matter, Moshe Tal sought to intervene in the action on the ground that the taxpayers' interest was not being adequately represented by the City. The trial court denied the motion to intervene and that denial was appealed to the Oklahoma Supreme Court by Moshe Tal (referred to as *Tal I*).[4] Opinion, App. to Petition, pp. 17-31.

On September 1, 1999, the Oklahoma Supreme Court affirmed in *Tal I* the trial court's denial of Moshe Tal's motion to intervene. The Oklahoma Supreme Court affirmed the ruling on the basis that Moshe Tal had not

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[4] The trial court later ruled that the contracts were valid. Opinion, App. to Petition, p. 24.

overcome the presumption that Oklahoma City was adequately representing the rights of all taxpayers. Opinion, App. to Petition, pp. 17-31. Thereafter, on October 26, 1999, the Oklahoma Supreme Court in *Tal II* affirmed the dismissal of the *qui tam* action brought by Moshe Tal. The court held that its ruling in *Tal I* adequately disposed of the arguments in *Tal II* and that the trial court correctly ruled the *qui tam* action was prematurely brought. Opinion, App. to Petition, pp. 32-38.

On March 15, 2000, Moshe Tal filed another *qui tam* action based on the written demand he had filed with the City on September 12, 1999. In that action, Moshe Tal claimed that despite the ruling by the Oklahoma Supreme Court in *Tal I*, taxpayers had not been adequately represented in the declaratory judgment action brought by the City and that they were entitled to bring this action to have the contracts declared invalid and to recover as a reward part of the monies illegally obtained through the contracts. The defendants moved to dismiss the action on several grounds, including the legal premise that the issue of Moshe Tal's standing to bring this action was decided in *Tal I*.[5] The trial court granted defendants'

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[5] Torchmark filed a separate motion for summary judgment on issues raised by other defendants in motions to dismiss. Torchmark's motion was disposed of and Torchmark was granted judgment by the journal entry of judgment entered by the trial court on May 23, 2000. Journal Entry of Judgment, App. to Petition, pp. 14-16. Another issue raised by the defendants and accepted by the trial court was that Moshe Tal's action was untimely because it was not brought within six (6) months of the written demand. Record Docs. Nos. 1-8.

motions and Moshe Tal appealed (referred to as *Tal III*). Opinion, App. to Petition, pp. 1-13.

On September 26, 2000, the Oklahoma Supreme Court in *Tal III* affirmed the dismissal of the *qui tam* action brought by Moshe Tal. The Oklahoma Supreme Court affirmed the trial court on the basis that Moshe Tal lacked standing to prosecute the action because, as found by the court in *Tal I*, Moshe Tal had failed to make a showing that the City was not adequately representing taxpayers' interest.[6] Moshe Tal filed for rehearing and the Oklahoma Supreme Court denied the petition for rehearing on February 5, 2001. Opinion, App. to Petition, pp. 1-13.

From that denial of rehearing, Moshe Tal has filed a petition for writ of certiorari in this Court.

REASON FOR DENYING THE WRIT

Moshe Tal's petition for a writ of certiorari should be denied simply for the reason that Moshe Tal, despite his contentions to the contrary, has not shown that the Oklahoma Supreme Court has decided a matter involving a federal question not settled by this Court or has decided an important federal question in such a way that conflicts with applicable decisions of this Court. Moshe Tal's petition is nothing more than an attempt under the guise of a

[6] The Oklahoma Supreme Court also held in *Tal III* that Moshe Tal had violated the court rules by failing to divulge in the petition in error in the appeal the relationship among *Tal I*, *Tal II* and *Tal III*. Opinion, App. to Petition, pp. 8-9.

due process argument to have this Court interpret state statutes and reevaluate the state court's factual finding concerning the adequacy of the government's representation of taxpayers in a state *qui tam* action. This Court does not intervene to interpret state law or to review factual findings by a state court.

As shown by the facts in this matter, two separate *qui tam* actions concerning Bricktown projects have been prosecuted by government officials as a result of Moshe Tal's demands. On three separate occasions – *Tal I* by a motion to intervene, *Tal II* by a premature *qui tam* action, and *Tal III*, an after-the-fact *qui tam* action – Moshe Tal has attempted to litigate the matter himself in an attempt to collect a reward. Under Oklahoma's *qui tam* statute, a taxpayer only has standing to prosecute an alleged illegal use of public funds if, after appropriate demand, the appropriate government official refuses to institute or diligently prosecute proper proceedings. Okla. Stat. tit. 62, §373. In this case, the government has not only pursued the action, which by statute prohibits Moshe Tal from bringing an individual action on behalf of the State, but also he has been afforded the opportunity to contest the adequacy of the government's representation on behalf of taxpayers in those actions.

This case does not present a situation where an individual's own personal interest is at stake and the court is attempting to hold that individual bound by a decision in which he did not participate. As announced by the Supreme Court in *Hansberry v. Lee*, 311 U.S. 31 (1940), where an individual's own personal interest is at stake, one cannot be bound by a decision in a process where he was absent unless he is a member of a class whose

interests are so common that his interest has been adequately represented by another in the previous proceedings. Despite Moshe Tal's contentions to the contrary, the Court in *Hansberry* did not hold that where a claim is of a representative nature that a prior decision will not be binding on all on behalf of whom the action was brought. In *Hansberry*, the Court found that the interests of those in the first proceeding were different from those in the second proceeding and thus the first proceeding did not bar relitigation of the individual interests of those in the second proceeding *Id.*

Here, Moshe Tal, who does not have standing under state law to litigate unless government officials are not properly prosecuting the action, has had the opportunity to litigate the issue of whether government officials were adequately representing the interests of all taxpayers. He is not an absent member who has not been given the opportunity to contest the representation of the taxpayers at large. The fact that he chose to contest the adequacy of the representation of taxpayers' interest through a motion to intervene in *Tal I* and that he disagrees with the decision reached by the state courts in denying his motion to intervene[7] in *Tal I* and with the decision by the state

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[7] Moshe Tal's argument that the federal intervention rule has been amended to eliminate "the bound by" requirement and, therefore, the ruling on his motion to intervene did not decide the issue of whether he is bound by that ruling in later proceedings is totally irrelevant. Moshe Tal's right to intervene is governed by state law – that being, his right to intervene under Oklahoma's intervention and *qui tam* statutes. Okla. Stat. tit. 12, §2024; Okla. Stat. tit. 62, §§372-373. Under Oklahoma law, a party may seek intervention as a matter of right only when a

courts that he cannot relitigate that issue in a later proceeding does not violate due process under the rule announced in *Hansberry* so as to entitle him to relitigate the issue in a later proceeding.

More importantly, the question presented by Moshe Tal was answered by this Court in *Richards v. Jefferson County, Ala.*, 517 U.S. 793 (1996). In *Richards*, this Court addressed the issue under what circumstances state courts were free to apply the doctrine of *res judicata* to taxpayer cases. The Court identified two categories of taxpayers' actions. The Court stated:

> Our answer requires us to distinguish between two types of actions brought by taxpayers. In one category are cases in which the taxpayer is using that status to entitle him to

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statute confers such an unconditional right or when the applicant claims an individual interest which as a practical matter the disposition of the action may impair his ability to protect that interest and may seek permissive intervention at the discretion of the trial court only when a statute confers an unconditional right or when the applicant's claim and the main action have a common question of law or fact. Okla. Stat. tit. 12, §2024. As held by the Oklahoma Supreme Court, Moshe Tal's right to seek intervention was permissive at best. Opinion, App. to Petition, pp. 26-27. Through his motion to intervene, he chose at that time to litigate the adequacy of the government's representation. The trial court ruled that he had not made a sufficient factual showing to be entitled to intervene to prosecute the action and that ruling was affirmed by the Oklahoma Supreme Court. He lost and he has no right to repeatedly litigate the issue.

> complain about an alleged misuse of public funds.
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> * * *
>
> As to this category of cases, we may assume that the States have wide latitude to establish procedures not only to limit the number of judicial proceedings that may be entertained but also to determine whether to accord a taxpayer any standing at all.
>
> Because the guarantee of due process is not a mere form, however, there obviously exists another category of taxpayer cases in which the State may not deprive individual litigants of their own day in court. By virtue of presenting a federal constitutional challenge to a State's attempt to levy personal funds, petitioners clearly bring an action of this latter type.

Richards, 517 U.S. at 803 (citations omitted).

This case concerns the former category where a taxpayer is using that status to enable him to complain about misuse of government funds. As pointed out in *Richards*, this Court has held that States have wide latitude to limit the number of judicial proceedings and to determine whether a taxpayer should have standing at all. *Id.* The Oklahoma *qui tam* statute only gives standing to a taxpayer in situations that are involved in this action when the government does not adequately take action to protect the interests of the taxpayers at large. Okla. Stat. tit. 62, §373. In this case, the state courts have made the factual determination that the government entities were adequately representing the common interest of the taxpayers and that Moshe Tal had not made an adequate

showing that the government was not adequately representing the taxpayers when he moved to intervene in *Tal I*. Consequently, the state courts did have the right to refuse to allow Moshe Tal to bring *Tal III* on the basis that the ruling of the adequacy of the representation of the taxpayers in *Tal I* resolved the matter and Moshe Tal did not have standing to relitigate that matter.[8]

Moshe Tal's attempt to distinguish the *Richards* case with regard to the right of the State to limit judicial proceedings in category one taxpayer cases is disingenuous at best. *See* Moshe Tal's petition at pp. 13-14, n.5. In the footnote, Moshe Tal contends that "[t]he phrase 'diligently prosecute' shows the legislature's intent to allow a taxpayer action in situations where the government has already brought an action." *Id.* at p. 14, n.5. This argument highlights the essence of Moshe Tal's petition. He is requesting this Court to accept certiorari to interpret state law to determine when he himself can bring a *qui tam* action and how many times he can raise the same issue. He has not challenged the constitutionality, either facially or as applied, of the *qui tam* statute. Moshe Tal's due process rights have not been violated; he merely wants another chance to have another court reevaluate the adequacy of the government's representation. He does not have that right.

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[8] As noted by the Oklahoma Supreme Court in *Tal III*, Moshe Tal did not make any showing – factually or legally – why he has standing to bring another *qui tam* action in face of the ruling by the Oklahoma Supreme Court in *Tal I*. Opinion, App. to Petition, p. 7.

This matter has been properly decided under state law and Moshe Tal has been afforded all the due process to which he is entitled. The Oklahoma Supreme Court's decision in *Tal III* is in accord with the *Hansberry* and *Richards* decisions of this Court. Moshe Tal's petition should be denied.

CONCLUSION

For the above reasons, Respondent Torchmark Corporation objects to Moshe Tal's petition for a writ of certiorari and requests this Court to deny the same.

Respectfully submitted,

JOHN T. EDWARDS
*ROBERT C. SMITH, JR.
MONNET HAYES BULLIS THOMPSON & EDWARDS
120 North Robinson, Suite 1719
Oklahoma City, Oklahoma 73102
Tel: (405) 232-5481

Attorneys for Respondent Torchmark Corporation

**Counsel of Record*